

Service Date: April 30, 2004

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF)	UTILITY DIVISION
Tariff Transmittal QLDC02-01)	
by Qwest LD Corp. d/b/a Qwest Long Distance)	DOCKET NO. D2002.12.153
Initial Tariff and Price List for Qwest Long)	
Distance)	ORDER NO. 6479f

ORDER ON MOTION FOR RECONSIDERATION

I. Findings of Fact

A. Background

1. On February 12, 2004 the Commission issued its Final Order (6479(d)) in this docket. On March 10, 2004 QLD filed a Motion For Reconsideration of Order 6479(d). In this order the Commission denies QLD's Motion For Reconsideration ("Motion" in the balance of this order). The Commission also clarifies Order 6479(d).

B. Motion for Reconsideration and Commission Decision

2. QLD's Motion raises three issues involving Customer Disclosure, Reporting, and Conditional Approval Requirements. As discussed below all three issues relate to the Commission's finding that the Other Common Carriers (OCCs) regulatory regime should be available to both QLD and QCC if and when these QC affiliates comply with this and the Commission's companion order (No. 6523(d)) in D2003.10.153. A summary of the OCC regulatory regime is contained in the Commission's Final Order (No. 6479(d) at Findings of Fact 70-79).

3. **Customer Disclosure Requirements.** In its Motion, QLD asserts that Customer Disclosure Requirements were not raised by any party to the docket and that there is no evidence or rationale to support them. QLD adds that not only is the record devoid of any such argument but the Commission provides no explanation other than to enable consumers to make informed judgments. QLD asserts that neither the order nor the record contain any evidence or

explanation of why QLD's customers require bill inserts in order to make informed judgments. QLD argues that because the requirements conflict with the Commission's determination that once QLD complies with its mandate it will be treated like other common carriers (OCCs), and because similar obligations are not placed on OCCs, the Customer Disclosure Requirements "constitute clear and unfounded discrimination against QLD." QLD adds that the requirements present operational problems and will inhibit QLD's ability to swiftly react to customer demands and the competitive marketplace. New products could become obsolete in the time it takes to gain PSC approval of the bill insert. Finally, QLD urges a rulemaking proceeding in order to determine the legality and necessity of such requirements for all carriers.

4. The Commission denies QLD's Motion on Customer Disclosure Requirements for the following reasons. First, the record supports the Commission's rationale for such a requirement. Commissioner Jergeson's cross examination of QLD's witness Mr. Tietzel is relevant:

Q.: I'm trying to find a circumstance where a call – where would I make a call that would be long distance that would involve paying for, for example, the proposed five cents a minute that would include the cost to Qwest for moving that call over an infrastructure somewhere, and is that cost less than the five cents a minute?

A.: Where does Qwest LD make its money on a case like this? Two places. Partly from the five dollars. Quite frequently in plans like this, people sign up for the plan – five cents a minute... and don't know their own calling enough to realize that the five dollars spread over the number of minutes they actually call may make it not economical for them. (TR 61-62, emphasis added)

5. The Commission finds based on this QLD testimony that consumers do not have sufficient information upon which to choose among QLD's tariff options. This market failure is precisely what the Commission's Customer Disclosure Requirement is intended to remedy. With a diagram of the total bill for each of QLD's residential tariff offerings consumers will have the opportunity to better understand the relation between the tariff options that QLD offers and will be able to make more rationale choices. The Commission finds that more information is preferable to less.

6. Second, QLD's assertion of discrimination is unfounded. The form of OCC regulation that the Commission finds reasonable for QLD is only reasonable once QLD addresses and mitigates the tying concern that the Commission raised in its final order (Findings of Fact 87 through 93 of Order No. 6479d). As the Commission stated in its QCC order "it is in the interests of Montana consumers to have one long distance affiliate of QC offering service in Montana, and urges QC, QLD and QCC, to offer a single statewide tariff through one long distance affiliate of QC, and to phase out the separate offerings that are currently available through either QLD or QCC." (Finding of Fact 15, QCC Order No. 5623(c), emphasis added). The Commission finds, however, that once this conditional requirement is satisfied the Customer Disclosure Requirement will cease to exist as a prerequisite to application of OCC regulation to the QC long distance affiliate.

7. As soon as the tying contained in the QLD and QCC offerings is eliminated any compliance cost will cease to be incurred by QLD and QCC, as the requirement to submit Customer Disclosures will have been eliminated for purposes of receiving OCC regulation.¹

8. Fourth, as for the asserted delay and the competitive impacts of waiting for Commission approval of bill inserts that comply with this Customer Disclosure Requirement QLD may voluntarily file bill inserts sooner than would otherwise be required by the Commission's order. If QLD chooses to do so, its action will certainly enable it to expedite the process of approval and distribution of approved bill inserts before they would otherwise be required. Following such an initial process there should remain only minimal incremental tariff changes for Commission approval. The choice is QLD's to voluntarily make an earlier filing than is otherwise required.

9. **Reporting Requirements.** QLD argues that there is no rationale or record to support the Commission's imposed reporting requirements and QLD adds that the reporting

¹ The allegation of "tying" was first raised by the MCC and then addressed in QLD's initial testimony rebutting MCC's testimony. As MCC stated, its concern did not rise to an antitrust violation but all tying should end. In this docket tying is a reference to QLD's exclusive offering of its services to just Qwest basic exchange service customers; QLD will not offer its services to basic exchange service customers of other ILECs or CLECs. This issue is thoroughly reviewed in the Commission's Final Order No. 6479(d) (see especially Findings of Fact Numbered 88-93).

requirements were not proposed by any party. QLD asserts that this is another example of discriminatory treatment of QLD. QLD also asserts that it could not determine QLD's market share from information that QLD solely provides, adding that information is needed from all other carriers; therefore, QLD asserts, the information it reports is "useless." In relation, QLD adds that because the Commission's order recognized that the long distance market is national, rather than local, the Commission would need information from carriers across the nation to determine QLD's market share; and, QLD adds, the Commission has no legal authority to obtain such information.

10. The Commission denies QLD's Motion on Reporting Requirements for the following reasons. First, as for the asserted absence of any rationale or record in support of obtaining the customers of Qwest that QLD captures, Commission Attorney Ms. Tranel cross examined MCC's witness Mr. Buckalew on the relevance of market share data. Mr. Buckalew's response is:

A.: I think it is relevant, I think, in addition to the market shares of the toll carriers, but we also need to look at what happened in the toll market over this period of time, in the market share that Qwest captured as a result of this filing. And following up on Commissioner Brainard's question to an earlier Qwest witness, we also need to look at the CLEC market shares. (TR 76-78, emphasis added)

11. Second, as for the asserted discriminatory treatment of QLD, the Commission has two responses. The Commission has previously found, and the MCC has maintained, that QLD is not like any other OCC (see especially Order 6479(d), Footnote No. 37). QLD will not receive OCC regulation before it receives Commission approval of a compliance filing that addresses its own exclusive tying arrangements.

12. Third, as for QLD's assertion that the market share data it reports would be "useless" the Commission responds as follows. It was QLD's witness Dr. Taylor who in an exchange with Commissioner Schneider testified:

Q.: Do you expect, given the Qwest name, and the fact that there is ... a substantial customer base for toll services with Qwest, that the prospect for migration of Qwest long distance customers to QLD or OCC has pretty high probability? That is, would you expect, given the corporate connection, that there's going to be substantial migration to one of the Qwest entities?

A.: Possibly...I guess I can also tell you – not based on Montana experience, but looking across the country – when former RBOCs get into long distance, the sort of market share that their long distance affiliate ends up with isn't the bulk of the market by any means. On the order of 25 percent probably would be my rough average of what has happened in many states. (TR 56-57, emphasis added)

13. The Commission finds Dr. Taylor's testimony instructive. Whereas in its Motion QLD asserts that it is impossible to measure market shares at the state level, Dr. Taylor has statewide evidence from across the nation upon which he predicts QLD's 25 percent market penetration within Montana. The Commission also has QLD's first proprietary reporting requirement filing in this docket (March 5, 2004). This proprietary data on the number of Qwest's basic exchange customer lines that QLD captured for toll service is revealing when it is combined with Qwest's total basic exchange access lines (Qwest's re-stated March 15, 2004 Annual Report of Qwest Corporation count of 383,286 access lines in 2002, Schedule 23 lists Total Access Lines for Montana). Based upon the proprietary market penetration data that QLD has submitted the Commission finds QLD's actual Montana market share to significantly exceed Dr. Taylor's prediction of a 25 percent penetration for QLD in Montana. This inaccuracy reinforces the conditional approval of OCC regulation for QLD.

14. Fourth, as for QLD's assertion, that because the Commission's order recognized the relevant long distance market is national rather than local and that the Commission would need information from carriers across the nation to determine QLD's market share, the Commission responds as follows. It is unclear to the Commission how Dr. Taylor estimated the market penetration for RBOCs in other states if the necessary data is difficult if not impossible to acquire. In any event, the Commission disagrees with QLD's assertion. With QLD's Motion, if QLD were to capture the entire Montana intrastate toll market it would follow, based on QLD's reasoning, that the resulting monopolization of the market is immaterial as the relevant economic market is a national market. In this regard, QLD is reminded of a Commission finding on market share:

The Commission finds that QLD's entry into the long distance interexchange market will likely reduce market concentration and increase the competitive market in Montana. The Commission notes that should the competitive market conditions change as a result of QLD's entry, the Commission may exercise its

regulatory authority over QLD in a comprehensive manner. (Finding of Fact 80, emphasis added)

15. In regard to the above, and combined with the market penetration that QLD has achieved, the Commission is concerned that QC may dominate the toll market in Montana. When combined with Qwest's near monopoly domination of the basic exchange market the Commission has grave concern about the competitiveness of Montana's markets.

16. As for QLD's allegation of discrimination, the Commission will, however, eliminate the Reporting Requirement imposed on QLD once the Commission's concern with exclusive tying arrangements is mitigated. The Commission may through some other forum such as a rulemaking revisit the need for this reporting requirement.

17. **Conditional Approval.** In its Motion QLD also seeks reconsideration of the Commission's decision to require QLD to make all products available to all Montana consumers. QLD asserts that other providers offer long distance in conjunction with the sale of local services and adds that such competition should be embraced. QLD adds that even though the Commission finds QLD to be an OCC carrier it then singles out QLD as the sole carrier operating in Montana that is not permitted to offer long distance service in conjunction with the purchase or existence of a local service. QLD finds no factual basis for this treatment. In addition, QLD asserts that this requirement violates Section 253 of the Telecommunications Act of 1996 and, or, 69-3-301 MCA.

18. The Commission denies QLD's Motion to reconsider the conditional approval basis for OCC regulation. First, and as noted earlier, QLD is unlike any other existing OCC. It is different from OCCs in large part because of its corporate affiliation with QC. Until such time as QC arranges for its affiliates QLD and QCC to mitigate the exclusive tying concerns that this Commission has, and further complies with any other conditions imposed by the Commission, OCC regulation is not available to either QLD or QCC.

19. QLD is offering services on an exclusive basis to just Qwest's local exchange service customers. As the Commission stated in its QCC order (No. 6523(c)) "it is in the interests of Montana consumers to have one long distance affiliate of QC offering service in Montana, and urges QC, QLD and QCC, to offer a single statewide tariff through one long

distance affiliate of QC, and to phase out the separate offerings that are currently available through either QLD or QCC.” (Finding of Fact 15, QCC Order No. 5623(c), emphasis added). If operational problems exist, the Commission may consider taking limited exceptions to its overall expectation that QLD and QCC will phase out their existing exclusive tying arrangements.

20. The Commission finds that in order for the customer disclosure and data reporting requirements to be lifted QLD must make a filing compliant with this order in coordination with QCC’s filing that is compliant with Order No. 6523(d). The Commission expects that that filing will provide for each of QLD and QCC to offer substantially identical services to any and all long distance toll users in Montana.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. QLD is a public utility offering regulated telecommunications services in the State of Montana. Sections 69-3-101, 803, MCA.

2. Every public utility shall file with the Commission tariffs (schedules) that are in force at the time any service is to be performed by it within the State of Montana. Section 69-3-301, MCA.

3. The rates that QLD is entitled to charge for service in Montana must be just and reasonable, and QLD has the burden of showing that the rates it proposes charging in Montana are just and reasonable. MCA § 69-3-201.

4. The regulatory regime the Commission will apply to QLD is that set out by the Commission in the OCC Orders. QLD shall be regulated according to the terms of the OCC regulatory regime, as specifically adopted in the Final Order entered in this docket.

5. The Commission denies QLD’s Motion for Reconsideration of the Commission’s Final Order in this docket for the reasons set forth above.

VI. Order

THEREFORE, based upon the foregoing, it is ORDERED that:

QLD’s Motion for Reconsideration is denied and clarified as set forth in this Order.

DONE AND DATED this 13th day of April, 2004, by a vote of 4 to 1 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Chairman

THOMAS J. SCHNEIDER, Vice Chairman

MATT BRAINARD, Commissioner

GREG JERGESON, Commissioner, Voting to Dissent

JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.